

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Wireless Telecommunications Bureau Seeks	)	WT Docket No. 11-186
Comment on the State of Mobile	)	
Wireless Competition	)	
	)	

**COMMENTS OF RCA – THE COMPETITIVE CARRIERS ASSOCIATION**

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RCA – The Competitive Carriers Association (“RCA”) hereby submits comments in response to the Commission’s Public Notice soliciting input and data for its Sixteenth Annual Report on the State of Competition in Mobile Wireless, including Commercial Mobile Radio Services.<sup>1</sup> RCA is an association representing more than 100 competitive wireless providers across the United States. Most of RCA’s members serve fewer than 500,000 customers. RCA’s role as the leading voice for competitive wireless carriers on legal and policy issues gives it a unique perspective on the state of wireless competition.

**INTRODUCTION AND SUMMARY**

As Chairman Genachowski recently recognized, “competition is the engine of our free market economy and a cornerstone of the FCC’s mandate.”<sup>2</sup> RCA in recent years has expressed concerns about the state of mobile wireless competition in the United States and continues to

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<sup>1</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Radio Services*, WT Docket No. 11-186, Public Notice, DA 11-1856 (Nov. 3, 2011) (“Public Notice”).

<sup>2</sup> Press Release, “Statement of FCC Chairman Julius Genachowski on Proposed AT&T/T-Mobile Transaction,” November 29, 2011.

believe that the significant increase in industry concentration is causing a variety of competitive harms. Specifically, the overly concentrated status of the wireless sector has caused scarce spectrum to be amassed in the hands of the two largest carriers, to the exclusion of smaller rivals. In addition, the market power enjoyed by the two largest super carriers has enabled them to thwart interoperability across the 700 MHz band. This continuing non-interoperability, coupled with exclusivity arrangements for cutting-edge devices, has hindered deployment by competitive carriers. And despite the Commission's data roaming order,<sup>3</sup> competitive carriers continue to face challenges securing roaming agreements from the two largest carriers on just and reasonable terms and conditions. Unless the Commission acts to restore competition and creates a regulatory structure that will protect all carriers' access to these critical inputs, competition will suffer.

RCA therefore urges the Commission to use its latest analysis of wireless competition as a catalyst to pursue pro-competitive policies that will level the playing field, ensure access to critical inputs, and spur investment and innovation. The Commission should take immediate steps to make more spectrum available, while implementing measures such as strict eligibility criteria and competitive bidding credits for new entrants and small and mid-sized carriers to ensure that the two super carriers, AT&T and Verizon, do not continue to dominate auction after auction. The Commission also should take action to promote a vibrantly competitive device ecosystem, particularly in the 700 MHz band, that in turn will spur new infrastructure deployment and economic growth. Finally, the Commission should continue to monitor the state of data roaming and take further action where necessary to ensure that competitive carriers have

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<sup>3</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265 (April 7, 2011).

access to this critical input at commercially reasonable rates so they can offer their customers the services that they demand and expect, including nationwide service.

## DISCUSSION

### I. THE WIRELESS INDUSTRY IS HIGHLY CONCENTRATED AND IS BECOMING A *DE FACTO* DUOPOLY

In its *Fourteenth Wireless Competition Report*, the Commission for the first time was unable to certify that the industry was characterized by “effective competition.”<sup>4</sup> The Commission at the time pointed to “continued industry consolidation,” and noted that the Herfindahl-Hirschman Index (HHI) indicated that the industry was highly concentrated.<sup>5</sup> This trend unfortunately has continued, and the Commission in its most recent *Fifteenth Wireless Competition Report* observed that HHI had further increased and the Commission again was unable to certify that the industry was characterized by effective competition. The Commission noted that, from 2003 through mid-2010, industry HHI had increased from 2,151 to an alarming 2,848 (where an HHI of greater than 2,500 indicates a “highly concentrated” market).<sup>6</sup> And, as the Commission has recognized, “market concentration in [Economic Areas] tends to increase as the EA population declines,”<sup>7</sup> which means that, for RCA’s members, many of which serve rural areas with lower population densities, these sky-high HHI numbers likely understate the concentration problem.

The major beneficiaries of this increased concentration have been the two super carriers, AT&T and Verizon. In 2009, the Commission found that, due to “continued industry consolidation,” AT&T and Verizon controlled 60 percent of subscribers and revenue and

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<sup>4</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407 ¶ 3 (2010) (“*Fourteenth Wireless Competition Report*”).

<sup>5</sup> *Id.* ¶ 4.

<sup>6</sup> See *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fifteenth Report, WT Docket No. 10-133, ¶ 2 (June 27, 2011) (“*Fifteenth Wireless Competition Report*”).

<sup>7</sup> *Id.* ¶ 53.

“continue to gain share.”<sup>8</sup> The GAO has noted that from 2006 to 2009, AT&T and Verizon increased their subscriber market share by nearly 20 percent.<sup>9</sup> AT&T’s and Verizon’s gains have continued, with one economist concluding that AT&T and Verizon enjoy a staggering 90% of industry EBITDA,<sup>10</sup> and that “the competitive landscape has continued to deteriorate in the last several years.”<sup>11</sup>

During the last year, industry concentration has continued to increase, posing even greater concerns for competitive carriers and consumers. The most recent development is Verizon’s proposed acquisition of 122 Advanced Wireless Services (AWS) spectrum licenses from Spectrum Co.,<sup>12</sup> covering 259 million POPs, for \$3.6 billion. Today, Verizon has a population-weighted spectrum holding of 88.4 MHz. If the transaction is approved, Verizon will acquire 20 MHz of additional AWS spectrum and increase its population-weighted spectrum holding to 105.2 MHz. What’s worse, this transaction would trigger the current FCC spectrum screen in very few counties. It appears, from early estimates, this transaction would trigger only 34 of the nation’s 3233 counties. Verizon will likely rely on the spectrum screen to argue that this transaction will not harm competition. But as RCA has previously argued, the FCC must consider and evaluate more than just spectrum aggregation harms.

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<sup>8</sup> Fourteenth Wireless Competition Report ¶ 3.

<sup>9</sup> Government Accountability Office, *Telecommunications: Enhanced Data Collection Could Help FCC Better Competition in the Wireless Industry*, Report to Congress, GAO-10-779, at 13 (July 2010).

<sup>10</sup> See Peter Cramton, *700 MHz Device Flexibility Promotes Competition*, (Aug. 9, 2010), attached to *Ex Parte Letter from Rebecca Murphy Thompson, General Counsel for Rural Cellular Association, to Marlene H. Dortch, Secretary, FCC*, filed in RM-11592 (Aug. 10, 2010).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> Spectrum Co. LLC is a joint venture between Comcast Corporation, Time Warner Cable, and Bright House Networks.

The Commission should reject Verizon's attempts to dismiss competitive and public interest harms based merely on the fact that current spectrum screens in most markets may not be triggered. The Commission has never suggested that its spectrum screen analysis provides a basis to ignore actual harms to competition or the public interest. On the merits of this particular transaction—in which the Commission confronts increasing concentration in the industry, in which there is no serious question that the industry is threatened by two dominant carriers, and in which numerous competitors have established the actual harms to competition that they face—the Commission must move beyond screening tools and evaluate the actual competitive harms implicated by the transaction. Spectrum screens are mechanisms for predicting foreclosure effects, not for shielding actual foreclosure from evaluation. Verizon cannot hide behind spectrum screens to avoid grappling with the serious competitive harms caused by its acquisition.

At a minimum, the FCC should address the competitive harms that would result from this transaction. Any transaction that proposes to concentrate more spectrum into the hands of one of the two super carriers raises competitive concerns, particularly for smaller carriers. Because spectrum is a finite, critical input for wireless carriers, any spectrum deal needs to address competitive concerns, including lack of interoperability in the 700 MHz spectrum, data roaming at commercially reasonable terms and conditions, fair and equitable access to devices and nondiscriminatory interconnection.

Another significant development, of course, is AT&T's ill-conceived proposal to acquire T-Mobile, the fourth largest wireless carrier and one of only four national carriers. The Department of Justice estimates that the proposed acquisition would increase HHI by more than 200 points, with a national HHI of more than 3,100 for mobile wireless telecommunications



services, and an HHI of “at least” 3,400 for enterprise and government customers.<sup>13</sup> According to the Department of Justice, if the merger were to proceed, “customers of mobile wireless telecommunications services likely will face higher prices, less product variety and innovation, and poorer quality of services.”<sup>14</sup> As RCA explained in petitioning to deny the AT&T/T-Mobile transaction, the proposed acquisition would irreparably injure competition.<sup>15</sup>

RCA applauds the Chairman’s recent decision to circulate an order that would designate the applications for hearing. The Staff Report released by the Commission lays out in the starkest terms why the transaction would harm competition. After a lengthy analysis, including review of thousands of comments and data responses, the Staff Report finds that: (1) the transaction would cause “increased likelihood of unilateral and coordinated effects,” (2) the record raises material questions of fact on the competitive effects of the transaction in the markets for roaming, backhaul, and handsets/devices, (3) the applicants’ economic and engineering models are seriously flawed, (4) the asserted synergies of the transaction would not likely be passed on to consumers, and (5) other claimed public interest benefits lack support.<sup>16</sup> The report, in sum, eviscerates AT&T’s efforts to cast this anticompetitive transaction as consistent with the public interest.

AT&T also has pursued other efforts to increase its market power and industry dominance. AT&T already is the carrier with the most spectrum in the country, yet it has

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<sup>13</sup> See Complaint, *United States v. AT&T Inc. T-Mobile USA, Inc. and Deutsche Telekom AG*, No. 1:11-cv-1560 (D.D.C. filed Aug. 31, 2011), ¶¶ 23, 25, 26.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> See Petition to Deny of Rural Cellular Association, *Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (filed May 31, 2011).

<sup>16</sup> Staff Analysis and Findings, *Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, ¶ 13 (filed Nov. 30, 2011) (“Staff Report”).

entered into a series of new transactions to acquire additional spectrum,<sup>17</sup> including the acquisition of significant beachfront 700 MHz spectrum from Qualcomm.<sup>18</sup> These transactions, individually or taken together, would further cement AT&T's control over vast amounts of spectrum. RCA urges the Commission to carefully consider the competitive effects of these transactions, including whether the spectrum would better promote the public interest if sold to a carrier other than AT&T.

In addition, there have been other troubling indicators of increasing concentration and the fragile state of competition during the past year. Cox Communications recently announced that it is discontinuing its wireless service altogether, which both reflects the difficulties confronting new entrants in the wireless broadband arena and removes a potentially significant competitor that could have helped create a more balanced marketplace.<sup>19</sup> By the same token, LightSquared has been besieged with complaints by device manufacturers and others asserting concerns about GPS interference, which has already caused it to scale back its proposed spectrum usage and

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<sup>17</sup> See *New Cingular Wireless PCS, LLC and NEATT Wireless, LLC Seek FCC Consent to the Assignment of Broadband PCS Licenses* (ULS File No. 0004352233); *AT&T Mobility Spectrum LLC and Whidbey Telephone Company Seek FCC Consent to the Assignment of Lower 700 MHz B Block and Lower 700 MHz C Block Licenses* (ULS File Nos. 0004544863 and 0004544869); *AT&T Mobility Spectrum LLC and 700 MHz, LLC Seek FCC Consent to the Assignment of One Lower 700 MHz Band C Block License* (ULS File No. 0004621016); *AT&T Mobility Spectrum LLC and Knology of Kansas, Inc. Seek FCC Consent to the Assignment of One Lower 700 MHz Band B Block License* (ULS File No. 0004635440); *Shareholders of Redwood 700, Inc. and AT&T Inc. Seek FCC Consent to the Transfer of Control of Lower 700 MHz Band B and C Block Licenses Held by Redwood Wireless Corp.* (ULS File No. 0004643747); *AT&T Mobility Spectrum LLC and Maxima International, LLC Seek FCC Consent to the Assignment of One Lower 700 MHz Band B Block License* (ULS File No. 0004699707); *AT&T Mobility Spectrum LLC and BTA Ventures II, Inc. Seek FCC Consent to the Assignment of Lower 700 MHz Band B Block license* (ULS File No. 0004777216).

<sup>18</sup> See *AT&T Mobility Spectrum LLC and Qualcomm Incorporated Seek FCC Consent to the Assignment of Lower 700 MHz Band Licenses*, WT Docket No. 11-18.

<sup>19</sup> See Press Release, "Cox Communications to Discontinue Cox Wireless Service," (Nov. 15, 2011), available at <http://cox.mediaroom.com/index.php?s=43&item=569>.

prompted the Commission to require additional testing before any terrestrial operations may commence.<sup>20</sup> And Clearwire, another prominent competitor in the emerging 4G marketplace, has encountered serious questions about its ability to expand its wireless network.<sup>21</sup> These wholesale initiatives show great promise, and are sorely needed, but the reality is that both LightSquared and Clearwire face significant obstacles in competing against super carriers like Verizon and AT&T. The Commission staff recently recognized these realities in concluding that neither LightSquared nor Clearwire was positioned to provide or facilitate meaningful competition against a merged AT&T and T-Mobile.<sup>22</sup>

In light of such developments, it is hardly surprising that Verizon Wireless has announced its lack of concern over AT&T's proposed takeover of T-Mobile. As AT&T's joint beneficiary of the emerging wireless duopoly, Verizon Wireless naturally takes the position that "there needs to be consolidation ... as long as there is consolidation without regulation."<sup>23</sup> But Verizon Wireless is wrong on both counts: Far from allowing unbridled consolidation, the

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<sup>20</sup> See *Status of Testing in Connection with LightSquared's Request for ATC Commercial Operating Authority*, Public Notice, IB Docket No. 11-109, DA 11-1537 (rel. Sept. 13, 2011).

<sup>21</sup> See, e.g., Anton Torianovski et al., "Clearwire May Skip Debt Payment," *Wall St. Journal* (Nov. 19, 2011) ("The concern underscores just how difficult it has become for Clearwire, founded in 2003, to challenge the country's leading wireless carriers, Verizon Wireless and AT&T, Inc. . . ."), available at <http://online.wsj.com/article/SB10001424052970203611404577046304160608704.html>. On December 1, 2011, Clearwire received an addition infusion of capital from Sprint, but industry analysts have observed that Clearwire will require additional funding and may need to sell some of its spectrum in light of the challenges of competing with the two supercarriers. See Greg Bensinger and Anton Torianovski, "Clearwire, Sprint in Network Deal," *Wall St. Journal* (Dec. 2, 2011), available at <http://online.wsj.com/article/SB10001424052970204012004577072123907320862.html>.

<sup>22</sup> Staff Report ¶ 13.

<sup>23</sup> See Samuel Weigley, "Verizon OK with AT&T, T-Mobile Merger," (Nov. 21, 2011), available at <http://www.ibtimes.com/articles/253389/20111121/verizon-t-mobile-merger-sprint-justice-department.htm>.

Commission should block transactions that would further diminish competition, and it must exercise its regulatory authority in response to the overly concentrated status of the wireless marketplace. As explained below, the high degree of concentration already has caused, and will continue to cause, a number of serious competitive harms.

## **II. INCREASED CONCENTRATION IS CREATING ANTI-COMPETITIVE SPECTRUM AGGREGATION THAT ENABLES THE LARGEST CARRIERS TO FORECLOSE COMPETITION**

The Commission has recognized that spectrum is “an increasingly pivotal input” for wireless providers,<sup>24</sup> yet spectrum is in short supply. AT&T’s spectrum binge has resulted in it and Verizon controlling enormous amounts of scarce spectrum. AT&T and Verizon, by virtue of their increasing market power, will continue to place more and more value on acquiring additional spectrum because of its value in foreclosing rivals. In other words, AT&T’s and Verizon’s market power create a “foreclosure premium” on spectrum that will incentivize them to hoard spectrum to keep it out of competitors’ hands. Consequently, AT&T and Verizon can be expected to continue to purchase additional spectrum in private transactions. They can also be expected to win auction after auction absent Commission intervention, because they will bid higher in order to foreclose rivals. In this respect, it is notable that AT&T has gone on its recent spectrum binge despite holding significant amounts of AWS spectrum that it acquired in 2006 but has yet to deploy,<sup>25</sup> and despite its willingness to offer apparently excess AWS spectrum to T-Mobile as part of its breakup fee.<sup>26</sup>

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<sup>24</sup> Fourteenth Wireless Competition Report ¶ 4.

<sup>25</sup> See e.g., <http://www.dailywireless.org/2010/06/18/phoney-spectrum-scarcity> (noting that “T-Mobile, Cricket and MetroPCS are using their expensive AWS spectrum. Verizon and AT&T are not.”); see also Fourteenth Wireless Competition Report ¶ 259.

<sup>26</sup> See [http://mobilizeeverything.com/uploaded-files/Deal\\_Factsheet.pdf](http://mobilizeeverything.com/uploaded-files/Deal_Factsheet.pdf), at 2.

The dominant spectrum positions of AT&T and Verizon also make it less likely that smaller rivals will be able to discipline their pricing. As AT&T and Verizon control the crucial input of spectrum, smaller competitors will find it more difficult to expand their operations, in terms of both existing service areas and new geographic areas, in the face of a price increase by the super carriers. And ultimately, there is a risk of a spiraling effect: as AT&T and Verizon increase their share of spectrum, smaller carriers will become less effective competitors, which will make them less able to retain subscribers, which reduces their ability to maintain a consistent revenue stream and attract capital to invest in additional infrastructure.<sup>27</sup> The spectrum imbalance thus will make AT&T and Verizon even stronger going forward, while hindering the ability of smaller carriers to compete effectively.<sup>28</sup>

Competitive carriers need spectrum, primarily low-band spectrum, that is interoperable and free from interference to bring next generation services to their customers. The Commission should recognize the increasing concentration of scarce spectrum in the hands of only a few carriers, and should pursue market-opening policies such as eligibility criteria and bidding credits for auctions. RCA specifically supports MetroPCS's recommendation that the Commission initiate an NPRM to develop additional bidding credit proposals, including MetroPCS' Broadband Incentive Discount (BID) program, which may foster new and increased competition by providing needed incentives to new entrants and small and mid-sized carriers. In addition, the Commission should pursue interoperability mandates that ensure that competitive

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<sup>27</sup> Indeed, some members of RCA, such as MetroPCS, currently do not offer tablets and laptop cards as a result of a lack of spectrum.

<sup>28</sup> This will be further exacerbated as data continues to explode. The FCC recently found that mobile broadband traffic will increase 35-fold by 2015. Increased data usage on smaller and mid-sized carriers' networks may cause these carriers to evaluate whether they can grow their revenues.

carriers have a meaningful opportunity to deploy spectrum in the most cost-effective and efficient manner to meet consumer demand.

### **III. HIGH INDUSTRY CONCENTRATION HAS IMPAIRED DEVICE INTEROPERABILITY AND AVAILABILITY, AND HAS HINDERED DEPLOYMENT IN THE 700 MHZ BAND**

The Commission has recognized that, although “handsets and devices are becoming increasingly central to the dynamics of the overall wireless market,”<sup>29</sup> many of the most popular handsets “are subject to exclusivity arrangements that restrict their distribution to a single service provider.”<sup>30</sup> Increased industry concentration has enabled the largest carriers to secure exclusive rights to handsets, and to design handsets that prevent interoperability on other networks. The existence of exclusivity arrangements coupled with the lack of interoperability has led to AT&T and Verizon developing their own separate “ecosystems” of equipment and devices that cannot be used by competitors while creating a technical barrier to 4G LTE roaming.

In particular, many competitive wireless carriers hold licenses for lower A block 700 MHz spectrum, yet find it impossible (or at least extremely difficult) to obtain devices that are interoperable with AT&T’s and Verizon’s 700 MHz spectrum. As C-Spire (formerly Cellular South) has noted, AT&T and Verizon already exercise their market power when purchasing devices “to cause manufacturers of devices to sell devices only through AT&T and Verizon.”<sup>31</sup> C-Spire has “often been refused access to current devices” and “has had difficulty acquiring [devices that operate in the 700 MHz spectrum] because of the concentration of the market for

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<sup>29</sup> Fourteenth Wireless Competition Report ¶ 299.

<sup>30</sup> *Id.* ¶ 66.

<sup>31</sup> Complaint, *Cellular South, Inc. and Corr Wireless Communications, LLC v. AT&T, Inc., AT&T Mobility LLC, T-Mobile USA, Inc., and Deutsche Telekom AG*, No. 1:11-cv-1690, Dkt. 1, ¶ 53 (D.D.C. filed Sept. 19, 2011).

purchases of such devices in the hands of AT&T and Verizon.”<sup>32</sup> Together with AT&T’s and Verizon’s exclusivity arrangements, the lack of interoperability within the 700 MHz band has prevented many competitive carriers from obtaining the devices that make it economically feasible to deploy network facilities in the 700 MHz band and to introduce 4G services to their customers. This problem will get worse with the announced proposed acquisition by Verizon of Spectrum Co.’s AWS spectrum. If Verizon decides to roll out LTE over AWS before using its lower A block 700 MHz spectrum for LTE, smaller carriers’ ability to get scope and scale will be further delayed and therefore harm their ability to compete in the 4G market. In fact, Verizon recently touted its lead in deploying LTE, stating that it takes time to roll out the network, and that they intend to expand that lead.<sup>33</sup> Without access to devices, rural and regional carriers cannot compete in the 4G LTE market.

RCA recently commissioned an economic study that concluded that the continued non-interoperability across the 700 MHz spectrum band has a number of serious adverse consequences.<sup>34</sup> Specifically, the authors concluded that non-interoperability will raise the costs of public sector services that rely on wireless services and reduce broadband-enabled growth in economic activity and employment. These costs will harm governmental budgets at all levels, and could reduce federal revenues by potentially “several tens of billions of dollars from spectrum auctions alone.”<sup>35</sup> The study also concludes that AT&T and Verizon are pursuing business strategies that are thwarting interoperability within the 700 MHz band in a manner that

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<sup>32</sup> *Id.* ¶¶ 53, 56.

<sup>33</sup> See Roger Cheng, “Verizon’s Big Plans for 4G Next Year,” (Dec. 2, 2011), available at [http://news.cnet.com/8301-1035\\_3-57335807-94/verizons-big-plans-for-4g-next-year/](http://news.cnet.com/8301-1035_3-57335807-94/verizons-big-plans-for-4g-next-year/).

<sup>34</sup> See Martyn Roetter, Alan Pearce, and Barry Goodstadt, *Non-Interoperability at 700 MHz: Lower Revenues and Higher Prices*, November 2011, available at <https://rca-usa.org/wp-content/uploads/2011/11/RCA-700MHz-Interoperability-FNL.pdf>.

<sup>35</sup> *Id.* at 1.

increases their market power with no offsetting procompetitive effects.<sup>36</sup> Competitive carriers need a fertile device ecosystem to compete effectively and to provide 4G services to their customers. The Commission should recognize the impairments that competitive carriers face in obtaining devices, and should use the latest Wireless Competition Report to promote policies that improve interoperability and availability of devices.

For similar reasons, the Commission should ensure that its Section 251 framework remains fully intact in the face of technological changes, such as the migration to Internet Protocol communications. Maintaining basic interconnection rights, like interoperability, is essential to ensuring a robustly competitive and open communications marketplace. The Commission has rightly recognized the importance of ensuring nondiscriminatory access to IP interconnection arrangements, and RCA applauds the Commission both for requiring good-faith negotiations and for seeking to clarify the legal structures that govern such interconnection.<sup>37</sup>

#### **IV. INCREASED INDUSTRY CONCENTRATION MAKES IT MORE CHALLENGING FOR COMPETITIVE CARRIERS TO SECURE ROAMING ARRANGEMENTS ON COMMERCIALLY REASONABLE TERMS AND CONDITIONS**

The Commission has recognized that voice and data roaming “can be critical to providers remaining competitive in the mobile services marketplace,” and that “the availability of roaming capability is and will continue to be a critical component to enable consumers to have a competitive choice of facilities-based providers offering nationwide access to commercial mobile

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<sup>36</sup> *Id.* at 5-6.

<sup>37</sup> *See Connect America Fund, etc.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, ¶¶ 1011, 1335-1398 (rel. Nov. 18, 2011).



data services.”<sup>38</sup> Roaming is “particularly important for consumers in rural areas—where mobile data services may solely be available from small rural providers.”<sup>39</sup> RCA’s members are especially reliant on roaming agreements with nationwide carriers; they simply cannot cobble together the nationwide coverage that consumers expect and demand through arrangements with other regional providers.

With greater industry concentration has come greater dependence on the few remaining nationwide carriers to provide roaming on commercially reasonable terms and conditions. Yet Verizon and AT&T have been reluctant at best to engage in roaming arrangements. As the Commission acknowledged in its *Data Roaming Order*, “AT&T has largely refused to negotiate domestic 3G roaming arrangements until recently,” and the record in that proceeding included evidence that smaller carriers had “difficulties reaching agreements with Verizon Wireless.”<sup>40</sup> More significantly, with the impending transition to 4G technology, the Commission found it likely that AT&T and Verizon “will not be willing to offer roaming arrangements that cover [4G] networks any time in the near future, except in very limited circumstances.”<sup>41</sup> Ironically, AT&T’s proposed merger partner, T-Mobile recognized (before the transaction) that “AT&T, the dominant provider of roaming services for the GSM technology platform, now has the incentive and the ability to resist entering into reasonable data roaming agreements.”<sup>42</sup> T-Mobile called its

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<sup>38</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, FCC 11-52, ¶ 15 (rel. Apr. 7, 2011) (“*Data Roaming Order*”).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* ¶¶ 25, 26.

<sup>41</sup> *Id.* ¶ 27.

<sup>42</sup> T-Mobile USA, Inc., Notice of Ex Parte, WT Docket No. 05-265, at 4 (filed March 10, 2011) (emphasis added).

inability to secure a roaming agreement from AT&T “a classic case of market failure” and proof that “roaming is increasingly becoming a monopoly service provided on a unilateral basis.”<sup>43</sup>

The Commission’s *Data Roaming Order* was a welcome step in alleviating the problems that competitive carriers face in obtaining nationwide data roaming, but significant challenges remain. First, Verizon has appealed the *Data Roaming Order*, and thus the fate of the order remains in limbo. Second, the acquisition of T-Mobile by AT&T, if approved, would greatly exacerbate the difficulties that competitive carriers face in obtaining roaming rights by eliminating a potential nationwide roaming partner and combining the only two nationwide GSM networks. If approved, the “elimination of T-Mobile would leave AT&T as the only nationwide provider of GSM-based wholesale services, thereby eliminating competition in the provision of this type of wholesale services.”<sup>44</sup> Finally, the *Data Roaming Order* is an important backstop for private negotiations, but such negotiations remain highly asymmetrical, with the largest carriers having significant bargaining advantages over smaller carriers. AT&T and Verizon continue to have the incentive and ability to withhold roaming arrangements as a means to foreclose competition. And when “market” rates are set by duopolists such as AT&T and Verizon, the rates that competitive carriers pay remain well above the level that would prevail in a healthy marketplace.

As industry concentration increases, so does the ability and incentive of the super carriers to deny nationwide roaming on commercially reasonable terms and conditions. The *Data Roaming Order* is a helpful first step towards improving the situation, but as long as the industry remains highly concentrated, competitive carriers will face obstacles in obtaining nationwide roaming. The Commission should continue to monitor the state of data roaming agreements, and

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<sup>43</sup> *Id.*

<sup>44</sup> Staff Report ¶ 109.

step in where necessary to ensure that competitive carriers are in fact able to obtain roaming agreements on commercially reasonable terms and conditions.

**V. THE COMMISSION SHOULD IMPROVE ITS OVERSIGHT OF ILEC SPECIAL ACCESS SERVICES TO ENSURE THAT BACKHAUL IS AVAILABLE TO COMPETITIVE CARRIERS AT JUST AND REASONABLE PRICES**

Finally, special access is a crucial input that is necessary for competition to flourish, but unfortunately is available at supracompetitive rates because of a dearth of competition among wireline backhaul providers. Since the Commission deregulated special access, prices have risen.<sup>45</sup> This is not surprising given that the two dominant providers of special access, Verizon and AT&T, are affiliated with the two dominant wireless carriers. The Staff Report regarding the AT&T-T-Mobile transaction recognized that the concentrated state of the special access marketplace is linked to the state of competition in wireless services.<sup>46</sup> Accordingly, comprehensive special access pricing reform is necessary to ensure that backhaul is available to wireless competitors on reasonable terms and conditions. Absent such reform, smaller competitors will have little hope of competing with the super carriers that obtain special access from their own affiliates.

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<sup>45</sup> See, e.g., Comments of PAETEC Holdings Inc. *et al.*, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 2-5 (filed Jan. 19, 2010).

<sup>46</sup> See, e.g., Staff Report ¶ 82 n.247.

## CONCLUSION

For the last two years, the Commission has concluded that the wireless industry is highly concentrated, and becoming more concentrated. That trend unfortunately continues, to the detriment of competitive carriers, and ultimately consumers. The Commission should use its latest analysis of wireless competition as a springboard to focus more intensely on developing and implementing pro-competitive, pro-consumer policies that reduce concentration, restore competition, and ensure that competitive carriers have a level playing field to compete with the supercarriers, AT&T and Verizon.

Respectfully submitted,

/s/

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